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No. ~~1272~~ ~~1278~~

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY; MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL COMPANY; WILLIAM G. GRIMSDELL, DOING BUSINESS AS GROCER PRINTING COMPANY; CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT COMPANY; INDEPENDENT PNEUMATIC TOOL COMPANY; THE GALIGHER COMPANY; AND GRAY-CANNON LUMBER COMPANY,

RESPONDENTS.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

SHIRLEY P. JONES,
BENJAMIN L. RICH,
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Boston Building
Salt Lake City, Utah

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Citations

Statutes

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BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Acting Solicitor General has by letter dated May 12, 1945, sent a copy of page brief of a purported Petition for Writ of Certiorari to one attorney of this respondent, but no notice of filing, copy of the record, brief or petition, except as noted, has been served. In order, however, to avoid further delay and to expedite the ending of this case, William G. Grimsdell, doing business as Grocer Printing Company, opposes the issuance of a writ of certiorari to review the judgment entered in this case on March 5, 1945,

by the United States Circuit Court of Appeals for the Tenth Circuit. The cases of the other respondents are similar to his own.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. ....) is reported in 147 Fed. (2d) 912.

JURISDICTION

There is no impelling reason within the rules of this court, and particularly Rule 38, paragraph 5, for granting the writ of certiorari.

QUESTIONS PRESENTED

The United States has sustained no injury by the judgments in these cases. They are far less than they should have been.

STATEMENT

The statement of facts in the opinion of the Circuit Court of Appeals below is correct. The Government's statement in its petition is in some respects inadequate and misleading.

Two days after this case was instituted an order of possession was entered November 11, 1942 requiring the respondents to vacate their premises commencing November 17, 1942 to December 1, 1942 (R. 6-8). By this order the Government was given exclusive possession of respondents' premises.

Grocer Printing Company had been in possession of its premises for 26 years as a printing establishment (R. 155-156), 21 years of which were without any written lease

(R. 161). It had to remove machinery weighing approximately 60,000 pounds installed with special supports and equipment, and sign a five year lease for new quarters at greatly advanced rentals (R. 184).

Chicago Flexible Shaft Company had occupied its premises in the same building without a written lease under four different landlords for 26 years. Its premises were specially equipped (R. 217), and it had to pay increased rent, plus $500.00 bonus for new quarters (R. 223).

The Galigher Company had been in its premises in the same building without a written lease for 18 years with premises specially fitted and constructed for its business (R. 245-249), and it also had heavy moving expenses and increased rent to pay because of the taking of its property (R. 268).

The other tenants' rights of occupancy are set forth in the petition here and in the Circuit Court's opinion.

While the petition for condemnation sought a leasehold interest for the entire building for a term ending June 30, 1945 with the right of surrender on June 30, 1943 or June 30, 1944 (R. 3), there was no condemnation of the building. After the tenants were evicted by the order of possession the Government abandoned its condemnation proceedings against the owner by negotiating a lease with him. Up to the time of the pre-trial the landlord had no idea that the Government was contending that he had to pay the tenants out of the consideration received by him from the Government (R. 115-116). The Government here has apparently abandoned that contention. Negotiations with the owner for a lease continued right up to the time of trial which commenced March 30, 1943 (R. 149) when it

developed that the Government had entered into a lease with the landlord, Mr. Richards, covering a lease only from about March 28, 1943 to June 30, 1943 with an option to renew each year for ten years (R. 317-318). This lease made no provision either on the part of the Government or the landlord for payment of anything to the tenants (R. 567-568).

There never was any condemnation of the owners' property, either of the fee or of a leasehold interest. The Government joined in the motion to dismiss the case against the landlord (R. 568). The Government did not appeal from the judgment of dismissal of the landlord (R. 68-74).

The tenants were summarily evicted from premises they had occupied for years. Never at any time were they or have they been offered any compensation by the Government, which has always contended, as it does here, that they were entitled to nothing (R. 9-52, 89, 91-92).

The Government never has had a settled position in these cases. At the pre-trial it claimed it was condemning real estate, (R. 135), then that the jury must determine the reasonable rental value of the building to June 30, 1945, and that whatever the owner gets he will have to pay out to the tenants (R. 116), in spite of the fact that the Government had already insisted that the tenants were not entitled to anything (R. 93, 95, 103), and then it abandoned all proceedings against the landlord and made a three-month renewable lease with him.

On page 5 of its brief herein, the Government neglects to state that in testifying on behalf of some of the respondents, F. Orin Woodbury was expressly told that in considering evidence as to removal costs, reinstalling

equipment, cost of renovating or remodeling and the like he was not to consider such evidence as independent items of damage, but only as having a bearing on the value of the occupancy of the tenants' premises (R. 291). This was emphasized repeatedly in the trial. No evidence in the case was directed toward loss of profits, good will or loss of business (R. 160-161), and no such elements were ever presented to or considered by the jury. There is no question of "consequential damages" in this case and the Government's use of that term is inaccurate.

On page 6 of its brief herein, the Government gives the impression that the court left it to the jury to determine whether the measure of damages should be cost of moving, etc. Exactly the opposite is the fact. While the court admitted evidence of our damages he in effect told the jury to disregard it, the jury did so, and their verdicts are only a small fraction of our actual losses. In his instructions to the jury he said "that cannot be the measure of the rights of recovery. That is not 'just compensation'." The jury was definitely instructed that the Government was not called upon to award expenses of moving, etc. (R. 569-574).

REASONS FOR NOT GRANTING THE WRIT

On pages 7 and 8 of its petition here under the heading "Reasons for Granting the Writ" the Government has incorrectly stated the record. The United States did not condemn the Old Terminal Building for a period expiring June 30, 1945, or for any period. There was no condemnation of the building. It entered into a three months lease with the owner of the building with renewal privileges each year for ten years (R. 317-318). The Circuit Court did not concede that "the lease acquired by the Govern-

ment was for a term extending beyond the expiration of the lease owned by each of the tenants, with the exception of the Independent Pneumatic Tool Company and possibly with the exception of the lease owned by the Petty Motor Company." That quotation from the Circuit Court's opinion is the statement by the Circuit Court of the Government's contention, the same there as here. The Circuit Court did not agree with it. The Circuit Court said in answering this contention, "the basic principles announced in the General Motors case are not confined to the narrow facts involved therein." The term of the three months lease acquired by Government did not extend beyond the expiration of the leases of any one of the tenants.

Again on page 8 of its petition the Government gives the erroneous impression that the court allowed the jury to award us moving costs, etc.

There is no reason for granting this writ. The judgments against the Government were far less than they should have been, and under express instructions the jury failed to consider and ignored evidence of our actual losses. We are the injured parties. For example, Grocer Printing Company was given a judgment for $3,000.00 while its actual out-of-pocket expense and money loss by reason of its eviction by the Government was nearly $10,000.00 (R. 186). The Galigher Company was awarded $2,500.00, and its actual out-of-pocket expense is nearly $5,000.00 (R. 269). Chicago Flexible Shaft Company was awarded $1,800.00, and its actual out-of-pocket expense is nearly $3,500.00 (R. 230). And so with the other tenants. In other words, all of the tenants were damaged far more than the amounts of the verdicts given them by the jury. Their rights of

occupancy were taken and far less than their value awarded.

Under the heading "Questions Presented" on page 2 of its petition herein, the Government propounds the following:

> 1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than any of the existing leases are entitled to prove moving costs and consequential damages resulting from the moving as evidence of the value of their interests.
>
> 2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property.

The assumption is incorrect that the United States condemned property for a period longer than any of the existing leases, that consequential damages were considered, or that the jury awarded compensation for an indefinite period of time. The jury was told to find the value of our "occupancy," as of the time it was taken.

The real question presented is whether or not the Government may ruthlessly and recklessly confiscate private property without paying just compensation. These tenants had been in possession of their premises and business homes for many years. The Government contends it can oust them summarily without any compensation. Whether or not it destroys them is immaterial. It claims it is under no obligation to compensate them only because they had no written leases. This cannot be the law. It offends common sense and ordinary honesty. As said by the Circuit Court

of Appeals below, "the Government would in this case convert the Fifth Amendment from a guarantee of just compensation into an instrument of confiscation".

This court pointed out in the General Motors case, (323 U. S. 373) in discussing the word "property", that "the Constitutional provision is addressed to every sort of interest the citizen may possess", and later under the text of head note 4: "The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value." "Though the meaning of 'property' as used in * * * the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." *U. S. ex rel. T.V.A. vs. Powelson*, 319 U. S. 266. The tenancies here under Utah law, are property, Utah Code, Annotated, 1943, 104-60-3(2). Because a lease contains a clause that the lessee would remove upon ten days notice gives a condemnor no right under this clause, no such notice having been given. *Shipley vs. Pittsburgh, C. & W. R. Co.*, 216 Pa. 512, 65 Atl. 1094, "nor is the right of a tenant to damages or injuries to a leasehold defeated by the fact, that under the lease, the owner may terminate the tenancy on short notice." 18 Am. Jur. Sec. 232, page 866. See also *Des Moines Wetwash Laundry vs. City of Des Moines*, 197 Iowa 1082, 198 N. W. 486; *A. W. Duckett Co. vs. U. S.*, 266 U. S. 149.

As stated by the trial court's instructions and the Circuit Court of Appeals below, the month-to-month tenants had a right so far as the Government is concerned to remain in the possession of their premises forever. No one except their landlord had the right to dispossess them. For upwards of 20 years and more several of them

had been in possession and built up large and lucrative businesses without written leases. The United States had no rights of the landlord when it evicted us. It did so solely under its right of eminent domain. Under the Fifth Amendment when it evicts or condemns by virtue of this right it must pay just compensation. The Fifth Amendement would be a dead letter and "a sword instead of a shield" if the Government's contention in this case is true. No enemy invader ever more ruthlessly confiscated property, nor disclaimed responsibility for the damage it inflicted more cold bloodedly, than has the government in this case. It claims the right to confiscate, and that it is immune from liability.

In the General Motors case this court points out the dangers of approving what the Government did here. If the Government may oust long established tenants under the guise of a three-months renewable lease, it may oust them under the fiction of a one-day renewable lease and destroy not only the tenants' businesses, but the owner's property under the sophistry that it has taken nothing from them.

Cases with reference to the condemnation of real estate numerously cited by the Government are of little help in solving the problems here.

To the word "taken" in the Fifth Amendment has now been added by almost unanimous decision the words "or damaged". *U. S. vs. Chicago B. & Q. R. Company*, 82 Fed. (2d) 131, 139, certiorari denied, 298 U. S. 690. No argument is or should be needed with regard to whether or not the Government took our property. We were ousted and it went into possession.

Both the General Motors case and the Circuit Court below adequately discuss the question of "just compensa-

tion" which is not market value in this class of a case. This court in the General Motors case, under the text of headnote 2, says: "In the ordinary case, for want of a better standard, market value, so called, is the criterion of that value. In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value."

"When the ordinary measure of loss (decrease in actual or assumed 'market value') cannot be applied, as here, then 'whatever is necessary to be considered in order to determine what is an equivalent for the appropriation of private property is germane to the question of compensation.'" *U. S. vs. Wheeler*, 66 Fed. (2d) 977, 984 (Eighth Circuit).

No question of loss of profits or loss of business or other consequential damages is present in this case. In the case of *U. S. vs. Chicago B. & Q. R. Company*, supra, the Circuit Court distinquishes between direct and consequential damages in these words:

> "But obviously, confusion is found in the cases, and this confusion has seemingly misled learned counsel for appellant. This confusion comes, we think, from a failure to distinguish as to the origin of the independent cause. If the latter arises from the act of another person and so could have been obviated or prevented, or from natural causes acting abnormally, *e.g.* acts of God, damages arising from the original act are not recoverable, for they are consequential merely, and not proximate. But if the hurtful result shall arise from the original act done, perforce, or plus the normal operation of well known, uncontrollable and immutable

laws of physics and natural forces, we are incapable of either following or agreeing to the distinction." (Page 136)

"The war or the conditions which followed it did not suspend or affect these provisions" (the Fifth Amendment) *Monongahela Nav. Co. vs. U. S.*, 148 U. S. 312, 327.

The Government takes the position in its petition that because it needs housing for office purposes or military personnel during war it is justified in doing anything it desires. In the Monongahela case it is said: "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

The words "just compensation" have no technical or purely legal significance. They are in themselves expressive of the meaning intended. *National Laboratory and Supply Co. vs. U. S.*, (E. D. Pa. 1921), 275 Fed. 218.

The Government complains that the jury awarded us $10,000.00 when our actual damage was three times this sum and yet merely in renovating and remodeling our premises to suit its convenience the Government expended $78,000.00 up to the time of the trial (R. 109-112), and actually spent $100,000.00 with an additional $22,000.00 for a cafeteria in the basement, and then the Army abandoned the whole thing in less than a year.

The Government contends that it should have the benefit of the provision in the Independent Pneumatic Tool Company lease; that the lessee should not be entitled to any part of an award if the lease is taken by condemnation. This was an agreement between the lessor and the lessee and was for the benefit of the lessor, not the Government,

also, there was no award to the lessor of which the lessee might claim a part, nor is the lessee claiming any part of any award. Provisions, such as the foregoing, might be applicable to cases where the fee is condemned, but have no application under the circumstances here.

On page 12 of its brief the Government again makes the erroneous assertion that it took the premises until June 30, 1945. The Government repeatedly asserts that we did not possess any enforceable rights to occupy or use property, but were only tenants by permission. Nothing is further from the fact. As against all the world, including the Government we had an absolute right of possession from which no one could oust us unless the landlord did so by notice which was never given, or the Government did so by condemnation upon payment of compensation for what it took from us.

It is difficult to understand why the Government persists in piling up financial losses upon these respondents. It was the aggressor. It has never offered them one cent. It dragged them through a long, expensive and tedious trial with no theory to guide the Court, secured inconsequential awards against it, forced them to the Circuit Court of Appeals at tremendous expense on its own and their account, lost in both courts and now asks this Court to permit it to diminish further the meager damages secured by the tenants by requiring them to incur the additional expense of going through the whole thing again here. In this case there is no reason why the Government should be allowed to continue to pile up additional expense on these tenants until the entire amount of their awards is consumed in useless litigation.

The final argument of the Government is a peculiar one: That because it needs space for offices and housing during the war it should prevail in this case. Why we instead of the entire citizenry should bear this cost is not made clear. The Government instead of arguing to this Court that it has the right of confiscation should be urging this Court to protect the citizen from confiscation. The very reason the Government claims it needs these properties is to aid in the prosecution of a war to destroy the philosophy that Governments may confiscate citizens' property with impunity and without compensation. There is just no reason in the argument that the Government makes. The Government has not been injured in this case, but has seriously injured us. The verdicts against it are far less than they should have been, and it should not be permitted to harrass us longer. Its substantial rights have not been affected. No federal question in conflict with decisions of this Court is involved. The Writ should be denied.

Respectfully submitted,

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